

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

Biomedical Device Consultants
& Laboratories of Colorado, LLC

Plaintiff,

v.

TA Instruments – Waters LLC,

Defendants.

Civil No. 0:17-cv-03403 DWF-SER

**DECLARATION OF TROY NICKEL IN SUPPORT OF
DEFENDANT’S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

I, Troy Nickel, declare as follows:

1. I am Senior Product Manager at TA Instruments for the ElectroForce® product line. The facts stated below are within my personal knowledge and, if called upon to testify, I could and would competently testify thereto.

2. I have worked at TA Instruments since May 2015 and specifically on the ElectroForce® product line since October 1997 within previous companies of EnduraTEC and Bose Corporation. The ElectroForce® DuraPulse™ Heart Valve Test (HVT) Instrument is used for heart valve durability testing. Durability testing is required before any implantable heart valve can be sold in the United States.

3. I have read the Redacted Declaration of Craig Weinberg in Support of Plaintiff Biomedical Device Consultants & Laboratories of Colorado, LLC (“BDC”) Motion for Preliminary Injunction, filed on November 22, 2017 (“Weinberg Decl.”).

4. In his declaration, Mr. Weinberg states: “BDC's VDT-3600i currently has about an 80-90% share of the worldwide market for heart valve durability testing systems.” Weinberg Decl. at ¶ 11. Mr. Weinberg also states “[t]here are only four competitors in the market. These competitors currently are my company BDC, Defendant TA Instrument-Waters LLC (‘TA Instruments’), Dynatek Labs, and ViVibro Labs.” *Id.* at ¶ 10.

5. First, it is unclear what Mr. Weinberg means by the “worldwide market for heart valve durability testing systems.” There are various different ways one could define this “market.” Second, even if the market is defined very narrowly, I believe Mr. Weinberg significantly overstates BDC's share of the market, which I understand to be closer to 60%, at most. Finally, even if the market is defined narrowly, BDC left out a competitor: Blockwise Engineering.

6. Heart valve testing systems are expensive, costing from tens of thousands to over \$100,000 for a single system.

7. Customers of heart valve testing systems are sophisticated buyers; they demand an opportunity to test a system extensively in order to make an informed decision before deciding to purchase even a single system. In my experience, customers generally do not purchase one of these expensive machines just to try it out and see if they like it. Rather, customers take advantage of opportunities to test the systems before ever buying one.

8. In my experience, heart valve test system manufacturers are very willing to give demonstrations of their test systems to potential customers. Manufacturers also commonly either bring the system to be tested in the customer's lab for several days, or invite the customer to come test the system at the manufacturer's lab.

9. Further, in my experience, test system manufacturers may “loan” systems out to potential customers to allow the customer to test the device over time and make sure they want to

purchase it. For example, TA Instruments has “loaned” DuraPulse HVT Systems to potential customers for between one week and three months.

10. The DuraPulse HVT Instrument includes a drip guard. A picture of the drip guard appears below:



The drip guard serves to prevent test fluid in the DuraPulse HVT Instrument test chamber from reaching its drive motor.

11. In operation, the DuraPulse HVT Instrument uses either deionized (DI) water or a phosphate buffered saline (PBS) solution as its test fluid.

12. After acquiring ElectroForce from Bose, TA Instruments did not dramatically increase its efforts to market the DuraPulse HVT Instrument relative to Bose’s marketing efforts.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of December, 2017.


Troy Nickel